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August 22, 2003

VIA ELECTRONIC DELIVERY

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Written *Ex Parte* Presentation of Nextel Communications, Inc.
CC Docket No. 01-92

Dear Ms. Dortch:

Today, the attached electronic mail was sent to William Maher, Jane Jackson, Tamara Preiss, Steve Morris, Victoria Schlesinger, Rob Tanner and Joshua Swift of the Wireline Competition Bureau, and to John Muleta, Cathy Seidel, Jennifer Tomchin, Jared Carlson, Stacy Jordan, Joseph Levin and Peter Trachtenberg of the Wireless Telecommunications Bureau.

In accordance with the Commission's rules, one copy of this letter is being filed electronically in the above-captioned docket. Copies of this letter are also being provided to the Commission staff listed below. Please contact the undersigned if any questions arise in connection with this filing.

Respectfully submitted,

/s/Laura S. Gallagher
Counsel for Nextel Communications, Inc.

LSG:css
cc (w/encl.) William Maher
Jane Jackson
Tamara Preiss
Steve Morris
Victoria Schlesinger
Rob Tanner
Joshua Swift
John Muleta
Cathy Seidel
Jennifer Tomchin
Jared Carlson
Stacy Jordan
Joseph Levin
Peter Trachtenberg

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Gallagher, Laura S.

From: Gallagher, Laura S.

Sent: Friday, August 22, 2003 10:34 AM

To: 'Steve Morris'; Tamara Preiss; Victoria Schlesinger; John Muleta; William Maher; Jane Jackson; Cathy Seidel; Jennifer Tomchin; Robert Tanner; Jared Carlson; Stacy Jordan; Joseph Levin; Joshua Swift; Peter Trachtenberg

Cc: Phillips, Laura H.; Robert Mcnamara (robert.mcnamara@nextel.com); Garnet Goins (Garnet.Goins@Nextel.com); 'Sachs, Steve'; Bob Edgerly (bob.edgerly@nextel.com)

Subject: RE: CC Docket No. 01-92 -- 7th Circuit Tariff Decision

All,

Thank you for your prompt response to Nextel's August 14, 2003 electronic *ex parte* filing in CC Docket No. 01-92. The following is Nextel's response to Steve Morris's questions relating to that filing:

If the court is correct that the negotiation/arbitration process under sections 251/252 is the exclusive mechanism for establishing the terms and conditions for the interconnection of networks:

QUESTION 1: does an incumbent LEC have any obligation to interconnect with another carrier (directly or indirectly) in the absence of a 251/252 agreement? If so, what is the legal basis for that obligation?

As an initial matter, Nextel does not believe that *Wisconsin Bell v. Bie*, stands for the proposition that the negotiation/arbitration process under sections 251/252 is the *exclusive* mechanism for establishing the terms and conditions for the interconnection of carrier networks. The court states that the 1996 Act "*provides a machinery for encouraging interconnection.* The competitor can require the local phone company to negotiate, in good faith, an agreement authorizing interconnection on mutually agreeable terms. If negotiations fail, the competitor can seek arbitration by the state regulatory commission, and the commission's arbitral decision can be challenged in federal district court on the ground that the decision fails to comply with 47 U.S.C. §§ 251 or 252, sections that establish pricing and other standards for interconnection." (emphasis added). Nowhere in the opinion does the court state that the negotiation arbitration process is the exclusive mechanism for establishing interconnection. Rather, the court recognizes that states may not create alternative methods for establishing interconnection terms that are inconsistent with the Section 251/252 interconnection procedures, including one-sided tariff filings that "place a thumb on the negotiating scales," by the party with the greatest bargaining power, the ILEC.

ILECs do have an obligation to interconnect with another carrier (directly or indirectly) in the absence of any 251/252 agreement. First, ILECs have a duty to interconnect under Section 201 of the Communications Act that is separate and apart from their Section 251/252 interconnection obligations. Section 201(a) of the Communications Act states that it is "the duty of every common carrier engaged in interstate or foreign communication . . . to furnish such communication service upon reasonable request therefore." 47 U.S.C. § 201(a). It also requires that common carriers establish physical connection with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest." 47 U.S.C. § 201(a).

Interpreting this obligation prior to the enactment of the 1996 Act with respect to LEC-CMRS interconnection, the Commission determined that pursuant to Section 201, common carriers must provide the type of interconnection reasonably requested by any CMRS provider. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, ¶ 227 (1994). In providing reasonable interconnection to CMRS providers, the Commission determined that the LECs must comply with "the principle of mutual compensation . . . under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities. Commercial mobile radio service providers, as well, shall be required to provide such compensation to LECs in connection with mobile-originated traffic terminating on LEC facilities." *Id.* at ¶ 232.

The Section 201 interconnection obligation remains undisturbed and in effect – despite the additions to the statute from the 1996 Act. Indeed, after the passage of the 1996 Act, the Commission continued to believe that Section 201 provides an independent interconnection obligation on ILECs. In the *Local Competition Order*, for instance, the Commission determined that "Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair." *Local Competition Order*, 11 FCC Rcd 15400, ¶ 1023 (1996). In addition, the 1993 Balanced Budget Act amending Sections 2(b) and 332 provided independent grounds for Commission jurisdiction over CMRS-ILEC interconnection outside of the 251/252 interconnection process. The Commission, itself, has recognized this: "Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates." *Local Competition Order*, 11 FCC Rcd at ¶ 1025.

In addition to the Section 201 interconnection obligation, Section 251(a) requires all telecommunications carriers to interconnect directly or indirectly with the facilities of other telecommunications carriers. Indirect interconnection pursuant to Section 251(a) does not require any interconnection contract and, in reality, the vast majority of carriers (both prior to and since the passage of the 1996 Act) interconnect indirectly with each other without a contract. This is because the benefits often do not outweigh the costs of negotiating and implementing a contract. This has particularly been true of the low volumes of traffic that a rural ILEC exchanges with CMRS carriers. Nextel, however, has been and continues to be willing to enter into interconnection negotiations with any carrier that wishes to do so, even when the process makes little economic sense.

Thus, in the real world, both before and after the 1996 Act, CMRS carriers and ILECs have been interconnecting with one another on a *de facto* "bill-and-keep" basis. Such bill-and-keep arrangements that carriers ordinarily use for traffic exchanged *via* indirect interconnection meets all of the requirements both under Section 201 and 251 of the Act. Indeed, the Act specifically recognizes bill-and-keep as an arrangement that affords "the mutual recovery of costs through the offsetting of reciprocal obligations." 47 U.S.C. § 252 (d)(2)(B)(i).

Thus, both the law and the practical method by which carriers have been interconnecting with one another prior to and since the passage of the 1996 Act, demonstrate that ILECs generally recognize they have a legal obligation under Section 201 and supporting Commission rules to interconnect with other carriers in the absence of a Section 251/252 agreement.

QUESTION 2: is an incumbent LEC obligated to accept traffic from another carrier in the absence of a 251/252 agreement? If so, what is the legal basis for that obligation?

Section 201 is the backstop that prevents the chaos that could result from an ILEC rejecting traffic from another carrier in the absence of a 251/252 agreement. Without Section 201, there could be a total breakdown of communication and presumably, ILECs could block any traffic terminating on their networks from carriers with which they have no signed Section 251/252 agreement. This result would be *wholly contrary* to the Commission's policy to prevent carriers from blocking calls or allowing calls to "drop," and would allow those with the biggest networks (the incumbents) to use interconnection as an anti-competitive tool.

Indeed, as the Commission has recognized: "universal connectivity is an important policy goal that our rules should continue to promote. The public has come to value and expect the ubiquity of the nation's telecommunications network." *See* Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 9923 (2001).

In the CLEC access charge proceeding, for instance, the Commission established regulatory benchmarks for CLEC access rates and limited the application of its tariff rules to CLEC access services because it was concerned about the imposition of excessive access charges on interexchange carriers. In doing so, however, the Commission "ma[d]e clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within [the] safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request." *Id.* at ¶ 5. According to the Commission, "any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service." *Id.* at ¶ 93. Thus, the Commission "conclude[d] that an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a)." *Id.* at ¶ 94. *See also* Telephone Number Portability, *Second Report and Order*, 12 FCC Rcd 12281, ¶ 26 (1997) ("allow[ing] terminating LECs to block calls, *[only] when failure to do so is likely to impair network reliability*.") (emphasis added).

The Commission has never taken the view that 251/252 is the only source of authority to require interconnection and it certainly should not take that highly disruptive step now.

QUESTION 3: If the answer in either case is that the obligation stems from the Commission's Part 51 rules, please explain how these rules apply in the absence of an agreement in light of the Commission's analysis in the TSR Wireless decision (see paras. 27-29 and the separate statements).

The *TSR Wireless* Decision supports Nextel's position that ILECs do have an obligation outside of 251/252 to interconnect with other carriers and are obligated to accept traffic from other carriers in the absence of a 251/252 agreement. In that order, the Commission rejected the assertion raised by the ILECs that "even if section 51.703(b) requires LECs to deliver LEC-originated traffic to complainants without charge, CMRS providers may only obtain that benefit by engaging in the section 252 agreement process." TSR Wireless v. U S West, *Memorandum Opinion and Order*, 15 FCC Rcd 11166, ¶ 27 (2000). Specifically, the defendant ILECs had argued that paging carriers "possess two options when seeking to terminate LEC-originated traffic: they may either purchase service from Defendants' state tariffs and thereby forgo their rights under section 51.703(b) of the rules, or they may formally request interconnection under sections 251 and 252 and obtain those rights either through negotiation or arbitration." *Id.* Further, the defendants argued that the Act "does not authorize the Commission to impose the reciprocal compensation duties of section 251(b)(5) - one of the statutory bases for section 51.703(b) - outside the context of negotiations undertaken pursuant to the procedures established in section 252 of the Act." *Id.* The defendants offered as support for this proposition the Eighth Circuit's decision, which they described as holding that the "sole avenue for enforcement and review of the provisions of sections 251 and 252 is the negotiation and arbitration procedures established in section

252." *Id.*

The Commission, however, rejected this argument noting that the "Supreme Court . . . vacated the Eighth Circuit's decision limiting the Commission's section 208 authority by concluding that the issue was not ripe for adjudication. It also explicitly held that the Commission has 'jurisdiction to make rules governing matters to which the 1996 Act applies.'" *Id.* (citation omitted). Thus, "[g]iven Defendant's argument relies on a vacated holding, the Commission will afford it no weight. Rather, the Defendants' obligations in this matter are governed by the Commission's *Local Competition Order*." *Id.* According to the Commission, the *Local Competition Order* requires a LEC to "'cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.'" *Id.* at ¶ 29 (citing *Local Competition Order*, 11 FCC Rcd at ¶ 1042). Therefore, "[d]efendants' argument that the benefits of section 51.703(b) of the Commission's rules are available only through a section 252 interconnection agreement process is incorrect." *Id.*

Nextel notes that the Commission, in *TSR Wireless*, did indicate that "to the extent that other Commission rules promulgated under the *Local Competition Order* were not made 'effective immediately,' we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251." *Id.* at note 97 (citation omitted). The Commission, however, ***did not require*** such requesting carriers to do so. Moreover, while former Commissioner Furchtgott-Roth read the statute and FCC rules otherwise, *i.e.*, that Section 51.703 of the rules governs the conduct of local exchange carriers (LECs) *only in the context of a negotiated and arbitrated interconnection agreemen*t, the Commission, as a whole, determined that that was not the correct view of how Commission rules interplay with 251/252 agreements. Commissioner Furchtgott-Roth apparently believed that the statutory duties of Section 251 do not apply generally to all LECs where the complaining party has not sought to secure the performance of those duties in an interconnection agreement as provided in section 252. This reading, however, *ignores the ILEC duty to interconnect indirectly under Section 251(a) as well as the general interconnection duty of all common carriers pursuant to Section 201.*

To sum up, then: (1) Nextel does not believe that *Wisconsin Bell v. Bie* stands for the proposition that the negotiation/arbitration process under sections 251/252 is the exclusive mechanism for establishing the terms and conditions for the interconnection of networks -- in fact the case demonstrates the problems with ILEC termination tariffs; (2) ILECs do have an obligation under Sections 201 and 251(a) to interconnect with another carrier (directly or indirectly) in the absence of a 251/252 agreement; (3) ILEC are obligated to accept traffic from another carrier in the absence of a 251/252 agreement; and (4) the Commission's analysis in the *TSR Wireless* decision supports this result. CMRS carriers, like Nextel, are subject to the interconnection requirements in Sections 201, 332 and 251(a). Under these rules, CMRS carriers are required to negotiate in good faith. As stated, Nextel has and does negotiate interconnection arrangements with ***any carrier*** that requests such negotiation. To the extent that you have other questions about Nextel's interconnection positions, please let me or Laura Phillips know.

Respectfully submitted,

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-----Original Message-----
From: Steve Morris [mailto:Steve.Morris@fcc.gov]
Sent: Friday, August 15, 2003 10:13 AM
To: Laura.Gallagher@dbr.com; Tamara Preiss; Victoria Schlesinger; John Muleta; William Maher; Jane Jackson; Cathy Seidel; Jennifer Tomchin; Robert Tanner; Jared Carlson; Stacy Jordan; Joseph Levin; Joshua Swift; Peter Trachtenberg; laura.phillips@dbr.com
Subject: RE: CC Docket No. 01-92 -- 7th Circuit Tariff Decision

Thank you Laura. After reviewing the decision, I would be interested in Nextel's response to the following questions:

If the court is correct that the negotiation/arbitration process under sections 251/252 is the exclusive mechanism for establishing the terms and conditions for the interconnection of networks:

1) does an incumbent LEC have any obligation to interconnect with another carrier (directly or indirectly) in the absence of a 251/252 agreement? If so, what is the legal basis for that obligation?

2) is an incumbent LEC obligated to accept traffic from another carrier in the absence of a 251/252 agreement? If so, what is the legal basis for that obligation?

If the answer in either case is that the obligation stems from the Commission's Part 51 rules, please explain how these rules apply in the absence of an agreement in light of the Commission's analysis in the TSR Wireless decision (see paras. 27-29 and the separate statements).

Thank you.

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-----Original Message-----
From: Laura.Gallagher@dbr.com [mailto:Laura.Gallagher@dbr.com]
Sent: Thursday, August 14, 2003 2:53 PM
To: Tamara Preiss; Steve Morris; Victoria Schlesinger; John Muleta; William Maher; Jane Jackson; Cathy Seidel; Jennifer Tomchin; Robert Tanner; Jared Carlson; Stacy Jordan; Joseph Levin; Joshua Swift; Peter Trachtenberg
Subject: CC Docket No. 01-92 -- 7th Circuit Tariff Decision

All,

I have attached for your review an opinion by the U.S. Court of Appeals for the Seventh Circuit that relates to the wireless termination tariff issues pending in CC Docket No. 01-92. Specifically, on August 12, the court held that a state PUC cannot substitute ILEC tariff filings for the negotiation and arbitration process set forth in Section 251/252 to set prices and terms for interconnection.

The case arose out of a Wisconsin PSC order requiring Wisconsin Bell to file a tariff setting forth the price and terms for interconnection with competitors such as WorldCom, rather than arbitrating an interconnection disagreement with WorldCom. Wisconsin Bell filed a complaint in Wisconsin District Court against the Wisconsin PSC commissioners challenging the order. The District Court held that the order is barred by the 1996 Act. WorldCom and the PSC appealed.

The 7th Circuit upheld the district court decision. Specifically, the court noted that the 1996 Act "provides a machinery for encouraging interconnection. The competitor can require the local phone company to negotiate, in good faith, an agreement authorizing interconnection on mutually agreeable terms. If negotiations fail, the competitor can seek arbitration by the state regulatory commission, and the commission's arbitral decision can be challenged in federal district court on the ground that the decision fails to comply with 47 U.S.C. §§ 251 or 252, sections that establish pricing and other standards for interconnection." As such, the court found that the Wisconsin PSC's "tariffing requirement is preempted by the Act."

Importantly, the court also found that the tariff requirement could not be saved by 47 U.S.C. § 261(b), which provides that there is no preemption of regulations that are consistent with the Act. The court reasoned that:
The [tariffing] requirement has to interfere with the procedures established by the federal act. It places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there. And it allows the other party to challenge the reservation price, and try to get it lowered, by challenging the tariff before the state regulatory commission, with further appeal possible to a state court -- even though Congress, in setting up the negotiation procedure, explicitly excluded the state courts from getting involved in it. At the very least, the tariff requirement complicates the contractual route by authorizing a parallel proceeding. (emphasis added)
Finally, the court concluded that the "tariff procedure shortcircuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate and interconnection agreement."

We believe this opinion fairly states the issues and points to the proper conclusions for the Commission's decision on wireless termination tariffs.

Please do not hesitate to contact me if you have any questions regarding the attached document.

Respectfully submitted,

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